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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

TOMMY MORGAN BRADY, Plaintiff and Appellant, v. GRANITE CONSTRUCTION CO., Defendant and Respondent.	D053961 (Super. Ct. No. ECU02411)

APPEAL from a judgment of the Superior Court of Imperial County, Joseph W. Zimmerman, Judge. Affirmed.

I.

INTRODUCTION

In March 2004, while driving his vehicle at night on Cruickshank Road in Imperial County, Tommy Brady struck a large pile of asphalt that had been left in the road. Brady's vehicle rolled over and he suffered severe personal injuries as a result of the collision. In March 2005, Brady filed this action, alleging that certain unknown defendants had negligently stored the asphalt on the road. Brady subsequently amended

his complaint to name Granite Construction, Co. (Granite) as a defendant. After the parties conducted extensive discovery, in March 2008, Granite moved for summary judgment on the ground that Brady did not possess, and could not reasonably obtain, evidence demonstrating that Granite had placed the asphalt on Cruickshank Road. The trial court granted Granite's motion for summary judgment on this ground and entered a judgment in its favor.

On appeal, Brady contends that the trial court erred in granting Granite's motion for summary judgment because the record contains evidence demonstrating that there is a triable issue of fact as to whether Granite stored the asphalt in the road. We affirm the judgment.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Brady's complaint*

In March 2005, Brady filed a two-count form complaint against unknown Doe defendants 1 through 100. In his complaint, Brady alleged two causes of action, negligence and premises liability. As to both causes of action, Brady alleged "Defendants . . . created a dangerous condition on a public roadway by storing a large pile of asphalt on Cruickshank Road." Brady further alleged that his vehicle collided with the pile of asphalt and that he suffered severe personal injuries as a result of the collision. In March 2006, Brady amended his complaint to name Granite and another company, Val-Rock, Inc., as defendants.

B. *Granite's motion for summary judgment*

In March 2008, approximately three years after Brady filed his initial complaint, Granite filed a motion for summary judgment. In its brief in support of its motion, Granite stated that in order for Brady to prevail on his claims, he would have to establish, among other elements, that Granite breached a duty of care owed to him. Granite argued that Brady could not establish such a breach because "[Brady's] factually devoid discovery responses confirm that [Brady] has no evidence linking the subject asphalt . . . with any act or omission on the part of Granite or its employees." Granite argued, "[Brady's] discovery responses make clear that [Brady] is no closer now to discovering who dumped the asphalt on Cruickshank Road than he was nearly four years ago."

In support of this argument, Granite quoted from its separate statement of undisputed facts in which it stated, "[Brady] has no facts establishing that Granite had any involvement in the placement of the subject asphalt piles on Cruickshank Road, but rather has a 'belief' without specific factual information that Granite did so."[1] In its accompanying statement of undisputed facts, Granite supported this statement by citing

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1 Granite's brief and accompanying statement of undisputed facts contained a number of statements consistent with this assertion such as, "[Brady] has no evidence that any person saw who dumped the asphalt pile," "[Brady] has no evidence that any person has ever admitted dumping asphalt on Cruickshank Road," "[Brady] does not know the identity of the person who drove the truck that dumped the asphalt on Cruickshank Road," and "[Brady] does not know the make or model of the truck, or the identity of its registered owner, from which the asphalt was dumped onto Cruickshank Road." In its separate statement of undisputed facts, Granite supported these statements with citations to its discovery requests, and Brady's responses thereto.

to Granite's discovery requests in which Granite asked Brady to list all facts, witnesses and documents that Brady contended supported his allegation that Granite had stored the pile of asphalt on Cruickshank Road, and Brady's responses to these requests.

In one request, Granite asked Brady to "State all facts upon which you base your contention that [Granite] stored a large pile of asphalt on Cruickshank Road as alleged in . . . your complaint." Brady responded, "[Brady] believe[s] that [Granite] had contracts with Cal Trans, specifically Job Number EA 11-236204 and Job Number EA11-199364. Said contracts are in the possession of Cal Trans and [Granite]. [Brady] further believe[s] that while performing said contracts, [Granite,] manufactured the asphalt, delivered the asphalt, and applied the asphalt to Highway 111, within one (1) mile of the accident site. And, at approximately the time it was performing that task, [Granite] its employees, supervisors and contractors negligently dumped, stored, and placed the asphalt at the accident site on Cruickshank Road."

In responding to Granite's request that he state "all facts upon which [he] base[d]" his refusal to admit that Granite did not store any asphalt on Cruickshank Road at any time within six months prior to the accident, Brady stated, "Plaintiff struck an asphalt pile that is of the type[,] composition and grade of material that is made by Defendant Granite. Defendant Granite maintains facilities near the area in which the incident took place and was also engaging in activities near the area where the subject incident took place prior to the accident." Granite lodged the relevant discovery requests and responses

that it cited in its separate statement of facts, in support of its motion for summary judgment.[2]

C. *Brady's opposition*

In June 2008, Brady filed an opposition to Granite's motion for summary judgment. In his opposition, Brady claimed that Granite had not met its burden of production in moving for summary judgment. Specifically, Brady maintained, "In order for [Granite] to even meet their initial burden, [Granite] needs to be able to account for every ounce of asphalt it produced and where the asphalt went before it can say that it had nothing to do with the asphalt." Brady did not address Granite's theory that it was entitled to summary judgment because Brady's discovery responses established that he did not possess, and could not reasonably obtain, evidence necessary to establish his claims.

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2 Granite's motion for summary judgment also could be read as arguing, in the alternative, that Granite had affirmatively established as a matter of law that it did not store the asphalt on Cruickshank Road. (See *Browne v. Turner Const. Co.* (2005) 127 Cal.App.4th 1334, 1339-1340 (*Browne*) [describing " 'positive refutation' " and " 'evidentiary negation' " as alternative methods by which a defendant may obtain summary judgment].) Granite lodged several declarations in an apparent attempt to support this alternative argument, including the declaration of its plant accountant, Michelle Bigoni. However, we need not discuss that evidence in light of our conclusion that Granite is entitled to summary judgment on the ground that Brady does not possess, and cannot obtain, evidence to establish his claims. (See pt. III.B.3, *post*.)

Brady contended that the following evidence established that that there was a triable issue of fact as to whether Granite was liable for his claims:

> "The Subject Asphalt was made by Granite. [Citation.]
>
> "The Subject Asphalt was dumped on the doorstep of Granite's El Centro Facility. Cruickshank Road is quite close to the Granite Facility. You can see the Granite Facility from Cruickshank Road. [Citation.]
>
> "Granite Vehicles have a history of using Cruickshank Road. [Citation.]
>
> "Granite's El Centro facility will not accept certain asphalt recycling if a fee is not paid. If the material was so valuable to Granite, Granite would pay drivers for it or take the material off their hands for free. [Citation.]
>
> "Granite was in the business of making the type of asphalt that was found inside the subject asphalt pile at the time of the incident and had control over Terra Trucking and Havens Trucking.[3] [Citation.]
>
> "During the time period in question, Granite drivers operated end dump trucks that hauled 3/4 inch hot mix asphalt capable of dumping the asphalt . . . on Cruickshank Road. [Citation.]
>
> "Every potential suspect pointed to [by] Granite has disputed liability and provided compelling evidence as to why they are not liable. [Citation.]
>
> "Granite's records concerning the coming and going of its asphalt products (especially within twenty four hours of the incident) are inaccurate, and highly suspect. Granite cannot for certain explain where all of its asphalt was coming and going. [Citation.]

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3 Brady did not refer to any evidence pertaining to the percentage of Granite products that these companies hauled, or any other evidence tending to demonstrate that either company was responsible for dumping the asphalt.

> "Tons of asphalt are not easily made and transported, Granite is one of the few companies capable of doing both in Imperial County and their fingerprints are all over the Subject Asphalt Pile. [Citation.]"

Brady lodged various declarations and transcripts of deposition testimony in support of these contentions. For example, Brady supported his contention that Granite had produced the asphalt that was left on Cruikshank Road with the declaration of geologist Scott Wolter. Wolter stated that he had performed a forensic analysis of samples taken from the asphalt pile on Cruickshank Road and samples of "Raw Aggregate" taken from Granite's Ocotillo facility.[4] Wolter opined that "the consistency of the mineral percentages [between the two samples] are as close to a fingerprint match as we get in the field of geology and petrography when looking at aggregate rock samples."

Brady supported his contention that Granite's vehicles had a history of using Cruickshank Road by citing to the deposition testimony of Cruickshank Road resident Mark Vogel. In his deposition, Vogel stated, "I would see their [Granite] pickups go down [on Cruickshank Road] . . . but I've never really seen any of their big trucks on it."

Brady supported his contention that other "suspects" were not responsible for the asphalt pile by lodging the declarations of employees of various other companies, including Larry Eskildsen, vice-president of Val-Rock, Inc., John Corcoran, president of Aggregate Products Inc., and Ryan Dickerson, a project supervisor at Pyramid

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[4] It is undisputed that Granite produced hot mix asphalt at two separate facilities, one in El Centro, and the other in Ocotillo. The Ocotillo facility is approximately 38 miles from the El Centro facility.

Construction and Aggregates, Inc. In their declarations, Eskildsen, Corcoran, and Dickerson each stated that their respective companies were not responsible for the manufacture and/or placement of the pile of asphalt on Cruickshank Road.

D. *Granite's reply and evidentiary objections*

Granite filed a reply brief in support of its motion. In its reply, Granite reiterated its arguments that Brady did not possess, and could not reasonably obtain, evidence in support of his claims. For example, Granite argued that even assuming for the sake of argument that there was sufficient evidence to establish that Granite manufactured the asphalt left on Cruickshank Road, there was no evidence demonstrating, among other facts, "whether possession, custody or control of the asphalt had been relinquished by Granite to another," or "who placed the asphalt on Cruickshank [Road]."

Granite also lodged various evidentiary objections to evidence that Brady offered in support of his opposition to Granite's motion for summary judgment. Granite argued that Wolter's conclusions lacked a sufficient factual basis. Granite also objected to the declarations of Esklidson, Corcoran, and Dickerson, on numerous grounds, including lack of foundation.

E. *The trial court's decision*

In June 2008, the trial court held a hearing on Granite's motion for summary judgment during which counsel for both parties reiterated points that they raised in their briefing. At the conclusion of the hearing, the trial court indicated that it was "going to deny the motion." The court later stated that it would take the parties' evidentiary objections under submission.

In July 2008, the trial court vacated its oral order denying Granite's motion for summary judgment and took the matter under submission.

In August 2008, the trial court issued a statement of decision granting the motion for summary judgment. The court reasoned in relevant part:

> "The motion for summary judgment by [Granite] on the duty and/or causation elements is granted.
>
> "[¶] . . . [¶]
>
> "The motion meets its initial burden of production. . . . [Granite] cites [Brady's] discovery responses in their separate statement of undisputed facts ─ numbers 50 through 78. The responses are sufficiently conjectural to shift the burden of production.
>
> "At issue is whether there are any triable issues of fact to indicate that Granite was responsible for the 6 foot tall by 12 foot wide 3/4 [inch] asphalt pile found on Cruickshank Road at the time of [Brady's] accident on or about March 24/25, 2004.
>
> "Granite was sued on the theory it was their asphalt since it was less than a mile from their El Centro facility and, according to plaintiff, Granite had to have been inferentially responsible for it being there in the middle of the road in the absence of any evidence indicating otherwise.
>
> "There are two sub-issues, whether the asphalt actually belonged to Granite and, if it did, whether Granite is responsible for it being in that road at that time.
>
> "Defendant's evidentiary objections to the declaration of geologist Scott Wolter are sustained. Even if plaintiff had a triable issue of fact by inference from the declaration of Wolter that the asphalt came from Granite's Ocotillo facility and not its nearby El Centro facility, plaintiff has no triable issues as to Granite's actual responsibility for the asphalt on the road at that time.
>
> "Notwithstanding plaintiff's considerable efforts in this case, at the conclusion of this motion, plaintiff does not have triable issues of fact indicating that it is more likely than not that Granite was

> responsible for the asphalt on the road at the time of the accident. Mere possibility or conjecture alone is insufficient to establish triable issues as to likelihood."

In addition to sustaining Granite's objections to the Wolter declaration, the trial court also sustained many of Granite's other evidentiary objections, including its objections to the declarations of Esklidson, Corcoran, and Dickerson.

The trial court entered judgment in favor of Granite.

F. *Brady's appeal*

Brady timely appeals from the judgment.

III.

DISCUSSION

The trial court did not err in granting Granite's motion for summary judgment

Brady claims that the trial court erred in granting Granite's motion for summary judgment.

A. *Governing law and standard of review*

1. *The relevant statutory framework*

A "motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code of Civ. Proc.[5], § 437c, subd. (c).) "A cause of action has no merit if . . . [o]ne or more of the elements of the cause of action cannot be

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5 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

separately established . . . ." (§ 437c, subd. (o)(1).) "A defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established. . . . Once the defendant . . . has met that burden, the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action. . . . The plaintiff . . . may not rely upon the mere allegations . . . of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . ." (§ 437c, subd. (p)(2).)

2. *The trial court's determination of a defendant's summary judgment motion*

A trial court must employ a "three-step process . . . in analyzing a summary judgment motion. . . ." (*Y.K.A. Industries, Inc. v. Redevelopment Agency of City of San Jose* (2009) 174 Cal.App.4th 339, 366.) The trial court must first " ' " 'identify the issues framed by the pleadings since it is these allegations to which the motion must respond.' " ' " (*Hamburg v. Wal-Mart Stores, Inc.* (2004) 116 Cal.App.4th 497, 503.) "The moving party need address only those theories actually pled, and an opposition which raises new issues is no substitute for an amended pleading." (*Bisno v. Douglas Emmett Realty Fund 1988* (2009) 174 Cal.App.4th 1534, 1543.)

Next, the trial court must consider whether the defendant has carried its "initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact." (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850

(*Aguilar*).) The defendant may carry this burden by demonstrating that "the plaintiff cannot establish at least one element of the cause of action . . . ." (*Id.* at p. 853.) The defendant may make such a showing by demonstrating "that the plaintiff does not possess, and cannot reasonably obtain, needed evidence . . . ." (*Ibid.*) "In this method, . . . the defendant need not affirmatively prove anything about what actually occurred; it is enough to show that there is insufficient evidence of what occurred, or insufficient evidence favorable to the plaintiff, to establish a necessary element of the cause of action." (*Browne*, *supra*, 127 Cal.App.4th at p. 1340.)[6]

If the trial court determines that the defendant has carried its burden of production, the court considers whether the plaintiff's opposition demonstrates a triable issue of fact. " 'The plaintiff . . . may not rely upon the mere allegations . . . ' of his 'pleadings to show that a triable issue of material fact exists but, instead,' must 'set forth the specific facts showing that a triable issue of material fact exists as to that cause of action. . . .' " (*Aguilar*, *supra*, 25 Cal.4th at p. 849.) "There is a triable issue of material fact if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion in accordance with the applicable standard of proof." (*Id.* at p. 850, fn. omitted.) Even assuming the defendant successfully shifts the burden of production, he still "bears the burden of persuasion that there is no triable issue

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6 Alternatively, a defendant may "come[] forward with evidence concerning the actual events at issue, and establishing a version of those events that is incompatible with the plaintiff's claims." (*Browne*, *supra*, 127 Cal.App.4th at p. 1339, italics omitted.)

of material fact and that he is entitled to judgment as a matter of law." (*Id*. at p. 850, fn. omitted.)

"In ruling on [a] motion [for summary judgment], the court must 'consider all of the evidence' and 'all' of the 'inferences' reasonably drawn therefrom [citations], and must view such evidence [citations] and such inferences [citations], in the light most favorable to the opposing party." (*Aguilar*, *supra*, 25 Cal.4th at p. 843.)

3. *The standard of review*

On appeal, this court "independently review[s] a motion for summary judgment using the same legal standards that governed the trial court's determination of the motion." (*Catholic Healthcare West v. California Ins. Guarantee Ass'n* (2009) 178 Cal.App.4th 15, 23.)

" 'On review of a summary judgment, the appellant has the burden of showing error, even if he did not bear the burden in the trial court. [Citation.] . . . ."[D]e novo review does not obligate us to cull the record for the benefit of the appellant in order to attempt to uncover the requisite triable issues. As with an appeal from any judgment, it is the appellant's responsibility to affirmatively demonstrate error and, therefore, to point out the triable issues the appellant claims are present by citation to the record and any supporting authority. . . ." [Citation.]' [Citation.]" (*Bains v. Moores* (2009) 172 Cal.App.4th 445, 455.)

B. *The trial court properly concluded that Brady does not possess and cannot reasonably obtain evidence to raise a triable issue of material fact*

1. *Brady's complaint*

In order to prevail on either his negligence claim or his premises liability claim, Brady would be required to prove that Granite breached a duty of care that it owed to him. (See, e.g. *Ortega v. Kmart Corp.* (2001) 26 Cal.4th 1200, 1205.) From his complaint, it appears that Brady intended to attempt to prove this element by alleging that Granite "stor[ed] a large pile of asphalt on Cruickshank Road."

2. *Granite carried its initial burden of production to make a prima facie showing of the nonexistence of any triable issue of material fact*

Granite moved for summary judgment on the ground that Brady could not establish that Granite had stored the pile of asphalt on Cruickshank Road.[7] Granite maintained that Brady's discovery responses indicated that he did not possess, and could not reasonably obtain, evidence to demonstrate this fact. Granite supported this contention in its separate statement of facts, with citations to Brady's responses to Granite's discovery requests.

On appeal, Brady asserts that his discovery responses contained "multiple facts and evidence." Specifically, Brady contends that his discovery responses demonstrated the following: one of Granite's facilities is located "less than a mile" from the accident site, Granite was working on jobsites at which asphalt was being used that was similar to

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7 We use the term "stored" because Brady alleged in his complaint that Granite had "stor[ed] a large pile of asphalt on Cruickshank Road."

the asphalt contained in the pile that was left on the road, Granite's trucks had used Cruickshank Road in the past, and no other asphalt manufacturer was responsible for the asphalt pile being left on Cruickshank Road. Brady argues, "Without even considering the further evidence [Brady] submitted in opposition to summary judgment, these facts alone are sufficient for the jury to infer that Granite was responsible for [Brady's] injuries."

We are not persuaded by Brady's argument. To begin with, it is difficult to tell from Brady's brief exactly which discovery responses he contends support these assertions. In the argument portion of his brief quoted above, Brady contends that "[a] review of the discovery responses cited by Granite reflect that Plaintiff's responses are *not* factually devoid." Brady supports this assertion with a citation to a block of approximately 290 pages of discovery responses. It is not our responsibility to "cull the record" to find support for Brady's arguments. (*Bains*, *supra*, 172 Cal.App.4th at p. 455.)

In any event, no reasonable juror could find that Granite was responsible for storing the asphalt on Cruickshank Road merely because one of Granite's facilities was located "less than a mile" from the asphalt pile and Granite was working on jobsites at which similar asphalt was being used. To hold Granite responsible for the asphalt on Cruickshank Road based on these facts would require impermissible " 'speculation, conjecture, imagination or guess work.' " (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 525.)

Brady's contention that his discovery responses demonstrated that "Granite['s] trucks had used Cruickshank Road in the past," appears to be based on his discovery

response that "[Brady's] vehicle struck an asphalt pile that consists of highway grade 'hot mix asphalt.' The fact that such highway grade 'hot mix' asphalt was on Cruikshank [R]oad is an indication that at least once during the time period at issue in the Request for Admission, Granite employees were traveling to and from the Granite Facility using Cruickshank Road."[8] Clearly, this circular assertion does not demonstrate that Brady had evidence sufficient to prevail on his claim.

Finally, Brady's contention that his discovery responses demonstrated that no other asphalt manufacturers were responsible for the asphalt pile being left on Cruickshank Road appears to be based on his assertion that, "[t]here is no evidence that any other person, company and/or entity . . . transported hot mix asphalt at or near the location of the occurrence of the subject incident at any time in close proximity to the time of the occurrence of the subject incident." Brady's bare assertion that there is a lack of evidence implicating other possible defendants does not constitute sufficient evidence for a jury to find Granite liable.[9] Accordingly, we reject Brady's claim that the trial court erred in concluding that Granite carried its burden of production.

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8 In considering whether Granite carried its burden of production, we restrict our discussion to an analysis of Brady's discovery responses that Granite offered in support of its motion for summary judgment. We consider the evidence that Brady offered in opposition to Granite's motion for summary judgment in support of this contention, in part II.B.3, *post*.

9 We consider the declarations that Brady offered in opposition to Granite's motion for summary judgment on this issue in part II.B.3, *post*.

3. *Brady did not demonstrate that a reasonable trier of fact could find that Granite stored the asphalt on Cruickshank Road*

We next consider whether Brady has demonstrated in the trial court that he has, or could reasonably obtain, evidence that would allow a reasonable trier of fact to find that Granite "stor[ed] a large pile of asphalt on Cruickshank Road."

Brady contends that the following items of evidence demonstrated that a triable issue of fact exists as to this issue. First, Brady maintains that the trial court erred in sustaining Granite's objections to the admission of the declaration of geologist Scott Wolter. Brady contends "the opinions expressed by [Wolter] raise triable issues of fact as to whether Granite is responsible for the pile of asphalt on Cruickshank Road."

Even assuming for the sake of argument that the trial court erred in sustaining Granite's objections to Wolter's declaration, at most, the declaration supports the proposition that Granite produced the asphalt contained in the asphalt pile on Cruickshank Road. However, Wolter's declaration does not create a triable issue of fact as to whether Granite "stor[ed]" the asphalt on Cruickshank Road, as Brady alleges in his complaint.[10]

Brady also restates his assertion that the fact that Granite's El Centro facility is "less than a mile" from the site of the accident supports the inference that Granite stored

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10 Brady also states that Granite was in the business of making the type of asphalt that was found in the pile on Cruickshank Road, and that Granite was producing such asphalt during the time period prior to the accident. However, this establishes nothing more than that Granite may have *produced* the asphalt found in the pile on Cruickshank Road. It does not create a triable issue of fact as to whether Granite *stored* the asphalt on the road.

the asphalt on Cruickshank Road. As stated previously, see part II.B.2, *ante*, a finding that Granite stored the asphalt on Cruickshank Road based on the fact that it had a facility located less than a mile from where the asphalt was left would be based on nothing more than speculation.[11] Evidence that Granite owned trucks that were "capable" of dumping the asphalt in question, and that Granite would, on occasion, produce more material than was necessary to complete a job on which it was working, is similarly unpersuasive. None of this evidence, whether viewed individually or cumulatively, is sufficient to create a triable issue of fact as to Granite's responsibility for storing the asphalt on Cruickshank Road.

With respect to Brady's contention that "there is a history of Granite vehicle's using Cruickshank Road," the only evidence to this effect was Vogel's deposition testimony that, "I would see their [Granite] pickups go down [on Cruickshank Road] . . . . but I've never really seen any of their big trucks on it." A reasonable jury could not find that Granite stored the asphalt pile on Cruickshank Road based on Vogel's testimony that he had seen Granite pickup trucks use Cruickshank Road, particularly in light of the undisputed fact that the asphalt pile could not have been "dumped by someone driving a pickup truck." (Italics omitted.)

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11 Brady stated in his opposition to Granite's motion for summary judgment that Granite's Ocotillo's facility is "where Granite obtains the material necessary for its asphalt products." However, Brady's separate statement of disputed facts does not establish this fact. In any event, even assuming that Wolter's analysis of samples taken from Granite's Ocotillo's facility supports the inference that the asphalt pile was produced at Granite's El Centro facility, this does not create a triable issue of fact that Granite stored the asphalt on Cruickshank Road.

Brady also argues that he "obtained evidence from the limited number of asphalt manufacturers confirming that they had no involvement with the subject asphalt being left on Cruickshank Road," citing declarations from employees of various asphalt manufacturers, including Val-Rock employee Larry Eskildsen. The trial court granted Granite's objection to "the entire declaration of Larry Eskildsen," as well as Granite's objections to several of the other declarations that Brady cited. Brady has not challenged these rulings in his opening brief. Thus, we must "consider all such evidence to have been properly excluded." (*Lopez v. Baca* (2002) 98 Cal.App.4th 1008, 1014-1015 [where party fails to "challenge the trial court's ruling sustaining . . . objections to certain evidence offered in opposition to the summary judgment motion," "any issues concerning the correctness of the trial court's evidentiary rulings have been waived"].) Brady is not entitled to reversal on the basis of this inadmissible evidence. (See *Brown v. Ransweiler*, *supra*, 171 Cal.App.4th at p. 529 ["A motion for summary judgment 'must be decided upon admissible evidence'"].)

Brady also contends that a portion of the declaration of Granite's plant accountant, Michelle Bigoni, creates a triable issue of fact as to whether Granite stored the asphalt in question on Cruickshank Road. In her declaration, Bigoni stated that less than 30 percent of the 3/4 inch hot mix asphalt[12] that Granite produced at its El Centro facility near the time of the accident was hauled by Granite's vehicles. Brady argues, "If during the

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12 It is undisputed that the pile of asphalt on Cruickshank Road was comprised of "3/4 inch hot mix asphalt. . . ."

relevant time period, 30% of the 3/4 [inch] hot mix asphalt manufactured by Granite was hauled by Granite from its El Centro facility, then an inference from such evidence might be that that the subject asphalt at issue was left on Cruickshank Road *by Granite* or one of its agents." We disagree. The fact that approximately 30 percent of 3/4 inch hot mix asphalt produced by Granite at its El Centro facility was hauled by Granite drivers is not sufficient to support a finding by a preponderance of the evidence that Granite was responsible for the particular asphalt pile left on Cruickshank Road at issue.

Finally, Brady contends that there are triable issues of fact as to whether Granite is liable for the actions of two trucking companies Granite hired to haul asphalt that it produced. This contention fails because Brady does not point to any evidence suggesting that either of these companies placed the asphalt on Cruickshank Road.[13]

In sum, none of the evidence that Brady has identified, even when viewed collectively, is sufficient to create a triable issue of fact as to Granite's responsibility for storing the asphalt on Cruickshank Road. Accordingly, the trial court properly granted Granite judgment as a matter of law.

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13 Brady makes various arguments as to the "affirmative evidence relied upon by Granite," in his attempt to demonstrate that Granite failed to demonstrate as a matter of law that it did not store the asphalt on Cruickshank Road. Among these arguments is Brady's contention that the trial court erred in overruling various objections that Brady raised as to Bigoni's declaration. We need not consider this contention, or Brady's other arguments in support of his claim that Granite failed to establish as a matter of law that it did not store the asphalt on Cruickshank Road, in light of our conclusion that Granite is entitled to summary judgment on the ground that Brady does not possess and cannot obtain evidence to establish his claims. (See *Browne, supra*, 127 Cal.App.4th at p. 1339.)

IV.

DISPOSITION

The judgment is affirmed. Granite is entitled to costs on appeal.

AARON, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.